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30 March 1999

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

EX PARTE

Re: Supplemental *Ex Parte* Submission in CC Docket No. 96-115

Dear Ms. Salas:

The Association of Directory Publishers ("ADP"), by its counsel, respectfully makes this supplemental submission to address questions posed by Commission staff and to invite renewed attention to the need for workable and effective rules implementing the requirement of Section 222(e) of the Communications Act, codified at 47 U.S.C. § 222(e), that subscriber list information ("SLI") be made available by local exchange carriers ("LECs") to independent directory publishers ("IDPs") at reasonable and nondiscriminatory rates.

I. SECTION 222(e) WAS INTENDED TO PROTECT AND ENCOURAGE COMPETITION IN THE DIRECTORY PUBLISHING BUSINESS.

Directory publishers owned and controlled by the incumbent LECs ("ILECs") enjoy a dominant 93 percent market share of the directory publishing industry.[1] The remaining 7 percent is divided among the IDPs, *i.e.*, those directory publishers not affiliated with the telephone companies.

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1 *See* Sebastian Weiss, *Alliance Media Secures Financing For Yellow-Pages Launch* San Antonio Business Journal, at 12 (13 Nov. 1998).

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In an effort to protect the market share (and significant profits in advertising revenue) of their directory publishing affiliates against competition, many ILECs historically either refused outright to sell SLI to competing directory publishers or imposed pricing and other terms so excessive as to constitute a virtual refusal to deal.[2] Other exclusionary practices have included a refusal to provide updated SLI, *i.e.*, change of address, new business, and other "directory-affecting" service order activity updates to the initial listings. Those LECs offering update services have structured their service offerings in such a way that most IDPs cannot afford to subscribe to these services. For example, BellSouth currently charges $1.50 per listing for daily updates and $2.00 per listing for new connect reports.[3] Finally, many LECs charge different rates depending on the number of times the listings are used or the type of directory published.[4]

To prevent LECs from continuing their anticompetitive behavior toward IDPs, Congress, in the Telecommunications Act of 1996, enacted Section 222(e), which provides:

> [A] telecommunications carrier that provides telephone exchange service shall provide subscriber list information gathered in its capacity as a provider of such service on a timely and unbundled basis, under nondiscriminatory and reasonable rates, terms, and conditions, to any person upon request for the purpose of publishing directories in any format.

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2 *See* Great Western Directories, Inc. v. Southwestern Bell Tel. Co., 63 F.3d 1378, 1383 (5th Cir. 1995)(finding that Southwestern Bell tripled its SLI prices twice within four years until they reached $0.50 per listing while simultaneously lowering the price it charged advertisers by 40 percent), *vacated and remanded in part on other grounds*, 74 F.3d 613 (5th Cir. 1996).

3 *See* BellSouth *Ex Parte* Submission at Exhibit 1 (19 Nov. 1998).

4 *See id.*; Ameritech *Ex Parte* Submission at Attachment 1 (17 Mar. 1999).

One reason Congress enacted Section 222(e) was to put an end to the LECs' practice of charging excessive prices for SLI, so as to promote competition in the directory publishing business. For example, conferees to the Telecommunications Act of 1996 observed that carriers have used pricing to deter entry into the directory publishing market and that Section 222(e) is intended to remedy this problem. Representative Paxon of New York stated that Section 222(e) "is a simple requirement to protect an area of telecommunications where there has been competition for more than a decade, but where service providers have used pricing and other terms to try to limit that competition. Now we are prohibiting such anticompetitive behavior."[5] Representative Barton of Texas reinforced this central purpose of Section 222(e), stating that "[c]arriers that charge excessive prices or set unfair conditions on listing sales deprive consumers and advertisers of cheaper, more innovative, more helpful directory alternatives."[6]

II. RULES DEFINING REASONABLE RATES FOR SUBSCRIBER LIST INFORMATION CAN AND SHOULD BE ADOPTED IN THIS PROCEEDING.

A. The Notice Made Clear That Cost-Based Rates For SLI Could Be Required.

The 17 May 1996 Notice of Proposed Rulemaking ("Notice") initiating this proceeding sought comment concerning what regulations or procedures may be necessary to implement the requirement in Section 222(e) that subscriber list information be provided "on a timely and unbundled basis, under nondiscriminatory and reasonable rates, terms, and conditions,"[7] observing in a footnote that the

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5 Floor Statement of Rep. Bill Paxon (1 Feb. 1996).

6 Floor Statement of Rep. Joe Barton (1 Feb. 1996).

7 Notice at ¶ 45.

Commission had "received information regarding difficulties faced by independent telephone directory publishers in obtaining subscriber list information, including rate issues," citing a 4 April 1996 letter submitted by counsel for ADP ("ADP White Paper").[8] The cited letter advocated, among other things, the adoption of rules requiring that rates for subscriber list information not exceed the LEC's incremental cost of providing such information to directory publishers plus a reasonable return.[9]

Thus, from the very outset of this proceeding, it has been clear to all parties that rules governing rates were under consideration and that rules requiring cost-based rates were among the options being considered by the Commission.

B. The Comments, Reply Comments, and *Ex Parte* Submissions Establish an Adequate Record for the Adoption of Rules Mandating Cost-Based Rates.

1. Comments.

Comments were submitted on 11 June 1996. ADP and MCI advocated the adoption of rules governing prices that would link SLI prices to some form of incremental cost.[10] In apparent response to the ADP White Paper cited in the Notice, several parties contended in their initial comments that reasonable rates under Section 222(e) should not be linked to incremental costs.[11]

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8 *Id.* n. 71.

9 ADP White Paper at 13.

10 *See* ADP Comments at 19-20; MCI Comments at 22-23 (proposing rates for SLI no greater than Total Long Run Service Incremental Cost).

11 *See, e.g.*, Comments of ALLTEL Telephone Service Corp. at 7 n.8; Comments of GTE Service Corp. at 18; Comments of Yellow Pages Publishers Association at 7-10.

ADP's comments were accompanied by a paper prepared by an economist, Dr. Christopher Pflaum of Spectrum Economics.[12] Based, in part, on his experience as an expert witness in antitrust litigation involving independent publishers' access to SLI, Dr. Pflaum noted the potential for unreasonable rates for SLI to impede and frustrate competition in the yellow pages directory business. Dr. Pflaum noted that there is no "market" for SLI -- each LEC has sole possession of the current and up-to-date SLI needed to publish directories that include its subscribers.[13] Dr. Pflaum concluded that reasonable SLI rates -- rates that would accomplish Congress's goal to protect and promote directory competition -- ought to be based on incremental costs or some surrogate for such costs.[14]

Two documents addressing the question of incremental costs for SLI were appended to ADP's Comments. These documents had been previously submitted to the Commission with the ADP White Paper cited in the Notice. The first document is a study submitted by BellSouth to the Florida Public Service Commission in 1993 setting out the incremental costs underlying the four cents per listing rate that BellSouth now charges for SLI under tariffs in Florida, Louisiana, Kentucky, and Mississippi.[15] That study shows an incremental cost of $0.003 per listing for a base file and $0.004

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12 Christopher C. Pflaum, Competitive Issues Relating to Subscriber Listing Information (June 1996)("Pflaum"), appended hereto as Exhibit A.

13 *Id.* at 2; *See also* U.S. Copyright Office, Report on Legal Protection for Databases, at 102 (Aug. 1997)(stating that "telephone subscriber information" is a "prototypical example[] of 'sole source' data")("U.S. Copyright Office Report").

14 Pflaum at 8-9.

15 Southern Bell Response to DADS and DPDS Data Request of the Florida Public Service Commission (8 Feb. 1993), appended hereto as Exhibit B.

for updates to that file. The second document cited in ADP's Comments is a Southwestern Bell document stating that incremental costs for SLI are less than one cent per listing.[16] As noted in ADP's Comments, all former Bell System companies use essentially the same systems, so that their costs should be equivalent to those shown in these documents.

The most detailed initial comments opposed to the adoption of rules mandating cost-based prices for SLI were submitted by the Yellow Pages Publishers Association ("YPPA"), a trade association representing the interests of yellow pages publishers affiliated with the ILECs.[17] YPPA argued that SLI rates should not be based on incremental costs but rather on the value of such listings to independent publishers.[18] YPPA's sole response to the cost data submitted by ADP in the letter cited in the Notice and resubmitted with ADP's Comments was to observe that the data were old and related to particular states.[19] However, neither YPPA nor the ILECs endorsing its position provided alternative cost data of any kind.[20]

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16 Southwestern Bell White Pages Plans, Plaintiff's Exhibit T108 in Great Western Directories, supra, note 2, appended hereto as Exhibit C.

17 Many YPPA members responded by dissenting from YPPA's views. ADP Comments at 1-3; ADP *Ex Parte* submission (12 Aug. 1996)(providing list of 115 ADP members, representing 71% of YPPA's membership in the U.S., who dissent from YPPA's views on SLI issues); *see also* Second *Ex Parte* Submission of Certain YPPA Members (5 June 1998)(disagreeing with YPPA's position on SLI and urging the Commission to adopt cost-based pricing rules to implement Section 222(e)).

18 YPPA Comments at 8.

19 *Id.* at 13-15.

20 Several of the major ILECs, in comments filed simultaneously with those of YPPA, endorsed or expressed agreement with YPPA's comments. *See, e.g.,* Comments of Ameritech at 17; Comments of Bell Atlantic at 3 n.2; Comments of BellSouth at 2 n.5; Comments of GTE at

2. Reply Comments.

The reply comments of ADP reiterated the point that reasonable rates for SLI should be based on costs, not "value." ADP contended that reasonable cost-based rates ought to be no greater than four or five cents per listing,[21] and were accompanied by draft rule language.[22] The reply comments of the Information Industry Association supported rules mandating provision of SLI at rates based on marginal cost.[23]

ALLTEL asserted that costs of obtaining and maintaining SLI vary among telephone companies but it provided no data concerning such costs or the variations asserted to exist.[24] Several parties, including GTE and SBC, asserted that reasonable SLI rates should be based on costs plus "value," but provided no information regarding costs.[25] Indeed, although numerous ILECs participated actively in this proceeding, no cost data were included in the comments of any of them. Thus, the sole data in the comments and reply comments indicate without contradiction that the incremental costs to ILECs of providing listings to directory publishers are less than one cent per listing.

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18. Several of the ILECs that commented on the question of implementation of Section 222(e), including NYNEX, Pacific Telesis, Southwestern Bell, and Sprint, did not address SLI rates at all in their initial comments.

21 ADP Reply Comments at 8-10.

22 *See id.* at Exhibit 1.

23 Reply Comments of the Information Industry Association at 4.

24 ALLTEL Reply Comments at 4.

25 GTE Reply Comments at 11; SBC Reply Comments at 14.

3. *Ex Parte* Submissions.

In the nearly three years since the close of the formal comment period in this docket, interested parties have made numerous permissible oral and written *ex parte* submissions, memorialized in the record, directed to the Commissioners and Commission staff. While those submissions contain a substantial quantity of useful data concerning prices charged for SLI by various LECs, they contain (with one exception, discussed below) no new data whatsoever concerning costs -- incremental or otherwise -- associated with SLI.[26] The Commission must necessarily conclude from this state of affairs that the cost data submitted by ADP -- all of which originated with ILECs -- are representative and accurate. The predominant LEC position, reflected in the comments and reiterated in several *ex parte* submissions by YPPA, is not that the cost data before the Commission are inaccurate but rather that rates for SLI ought to be based on "value" rather than cost.[27] The record before the Commission establishes that the ILECs' incremental costs associated with providing SLI to independent directory publishers are a fraction of a cent per listing and certainly no more than two cents per listing. This conclusion is bolstered by a recent *ex parte* submission by US WEST, stating

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[26] *See, e.g.,* Ameritech *Ex Parte* Submission, at 2-3 (17 Mar. 1999)(describing Ameritech's current pricing for SLI products but making no mention of Ameritech's costs).

[27] For example, YPPA's 4 December 1997 *ex parte* submission relates that YPPA representatives orally discussed the BellSouth cost data submitted by ADP but neither refers to nor provides any different data. BellSouth's 15 October 1998 *ex parte* submission asserts that testimony of a BellSouth employee confirming that BellSouth's four cent per listing rate produces a 1,300 percent profit over the $0.003 incremental cost is "incomplete" but neither refers to nor provides any different or additional data. BellSouth's 19 November 1998 *ex parte* submission purports to present detailed information concerning independent directory publishers' costs but provides no data at all concerning BellSouth's costs.

that "US WEST's . . . estimated cost for an initial unbundled SLI product or for updates would be between $.015 and $.02 per listing."[28]

C. The LECs' Failure to Provide Any Cost Data Contradicting ADP's Assertions Regarding Their Costs Must Be Understood to Mean That No Such Data Exist.

If a party has relevant evidence within his control that he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him.[29] The theory behind this rule is that, all things being equal, a party will voluntarily bring forward the strongest possible evidence available to prove his case.[30] This principle was recently applied in a regulatory setting in Cable & Wireless PLC v. FCC,[31] in which the D.C. Circuit held that the Commission properly set benchmark prices that U.S. carriers must pay to foreign carriers for termination services "by summing the estimated prices for

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28 U S West *Ex Parte* Submission (17 Mar. 1999).

29 *See* Alabama Power Co. v. FPC, 511 F.2d 383, 391 n.14 (D.C. Cir. 1974); Tendler v. Jaffe, 203 F.2d 14, 19 (D.C. Cir. 1953)("[T]he omission by a party to produce relevant and important evidence of which he has knowledge, and which is peculiarly within his control, raises the presumption that if produced the evidence would be unfavorable to his cause."); *see also* Commonwealth of Puerto Rico v. FMC, 468 F.2d 872, 880 (D.C. Cir. 1972)(Statutes placing the burden of justifying a rate increase on the regulated entity "constitute a 'common lore' of basic approach in rate regulation . . . .").

30 *See* UAW v. NLRB, 459 F.2d 1329, 1338 (D.C. Cir. 1972)("The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavorable to the party.") (*quoting* 2 J. Wigmore, Evidence § 285 (3d ed. 1940)).

31 No. 97-1612 (D.C. Cir. 12 Jan. 1999).

three services . . . necessary for terminating an international long-distance call . . . ."[32] The parties challenging the benchmarks objected that the Commission did not consider "data on the actual cost of foreign termination services."[33] The Court rejected these objections, noting that "[t]hroughout the rulemaking process . . . petitioners withheld the very cost data that would have enabled the Commission to establish precise, cost-based rates."[34]

Similarly, in this proceeding, the LECs have produced no data regarding their costs to provide SLI or SLI updates to IDPs that are inconsistent with ADP's proposed benchmarks. Moreover, the LECs have been aware since the inception of this proceeding that cost was at issue and that the Commission was considering requiring rates based on incremental or some other cost. In the face of the cost data submitted by ADP regarding the LECs' costs, the LECs have, almost uniformly, remained silent.[35] Accordingly, the Commission must infer that the (1) the cost data presented by ADP are accurate and (2) the LECs do not possess any relevant cost data not already in the record.

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32 *Id.* at 18-19.

33 *Id.* at 19.

34 *Id.* at 19-20; *see also* In re Beehive Tel. Co., Inc., *Memorandum Opinion and Order*, 13 FCC Rcd. 12275, at ¶ 26 (1998)(prescribing switched access rates based on average cost and investment of companies with a comparable number of access lines in the absence of reliable cost data submitted by Beehive).

35 Interrogatory responses submitted by SBC in a formal complaint pending before the Commission assert, for example, that SBC has no SLI cost data (other than the document submitted with Dr. Pflaum's report) and that SBC's current SLI prices exceed, but were not based on, SBC's costs. *See* YP-USA, Ltd. d/b/a The SunShine Pages v. Southwestern Bell Tel. Co., File No. E-99-07, *Defendant's Answers to Complainant's Request for Answers to Interrogatories*, at 1-3 (2 March 1999)("SBC Responses to Interrogatories"), appended hereto as Exhibit D.

III. ONLY COST-BASED RATES FOR SLI WILL ACHIEVE CONGRESS' GOAL OF ENSURING A LEVEL PLAYING FIELD IN THE DIRECTORY PUBLISHING BUSINESS.

Section 222(e) is intended to prevent LECs from engaging in anticompetitive behavior directed toward their independent publisher competitors. It is clear that these goals can only be achieved by ensuring that independent publishers pay for listings at a price approaching the cost of providing them plus a reasonable return. Under any other cost allocation scheme, LECs would be able to extract monopoly profits under the guise of "market" pricing because LECs represent the sole source of SLI.[36] If Congress had intended to permit LECs to continue to charge monopoly prices for SLI, the reasonable rate requirement of Section 222(e) would have been unnecessary.[37] The most effective way to accomplish the Congressional purpose to protect and promote competition in the directory publishing business is to ensure that LECs' rates for SLI are sufficient to allow the LECs a fair opportunity to recover their costs plus a reasonable profit but at the same time to ensure that such rates do not deter entry or impede competition in the directory business.[38]

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[36] *See* U.S. Copyright Office Report at 102; *see also* Local Competition II, Case Nos. 94-C-0095, 95-C-0657, 91-C-1174, 96-C-0036, *Order Resolving Petitions for Rehearing and Clarification of 22 July 1998 Order Regarding Directory Database Issues,* at 13 (NY PSC 7 Jan. 1999)("Directory databases are controlled by LECs because of their monopoly status")("NY Order on Reconsideration"), appended hereto as Exhibit E.

[37] It is a basic rule of statutory construction that Congress intends to give effect to all statutory provisions enacted by it. *See* Sutherland Stat. Const. § 46.06 (6th ed.).

[38] This view is supported by the legislative history of Section 222(e). Representatives Paxon and Barton both stated, in support of the enactment of Section 222(e), that the "most significant factor" in determining a "reasonable" price for SLI should be the "incremental" or "actual" cost of providing these data. Floor Statement of Rep. Bill Paxon (1 Feb. 1996); Floor Statement of Rep. Joe Barton (1 Feb. 1996). The NY PSC also recognized that "[p]ricing

The parties opposing the adoption of rules mandating cost-based rates for SLI rely primarily on the contention that use of the words "value of the listings" in the House Report on the House version of the provision that ultimately became Section 222(e)[39] was intended to ratify rates for SLI at whatever level the "market" will bear, *i.e.*, rates designed to appropriate to the telephone company whatever profits the independent publisher might make from using SLI.[40] That is, simply, an argument that Congress intended to ratify the status quo as it existed before Section 222 (e) was enacted (and largely exists today). If that is what Congress intended, it would not have bothered to subject SLI prices to regulation. The evident and stated purpose of Congress in enacting Section 222(e) was to guarantee IDPs access to SLI, in part by preventing LECs from imposing rates, terms, and conditions on competing directory publishers that might stifle or retard competition. Given Congress's recognition that "LECs have total control over subscriber list information,"[41] it is

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access to the database and directory listings at forward looking incremental costs allows LECs to earn a reasonable profit without taking advantage of their monopoly status." NY Order on Reconsideration at 13.

39 The House Report states, in pertinent part, that Section 222(e) "meets the needs of independent publishers for access to subscriber data on reasonable terms and conditions, while at the same time ensuring that the telephone companies that gather and maintain such data are fairly compensated for the value of the listings." H.R. Rep. No. 104-204, Part I, 104th Cong., 1st Sess. at 89 (1995)("House Report").

40 *See, e.g.*, Ameritech *Ex Parte* Submission at 3 (17 Mar. 1999)(stating that Ameritech's higher price for daily updates "reflects the fact that daily business updates are considered valuable as sales leads").

41 House Report at 89.

inconceivable that Congress could have intended reasonable rates to have any meaning other than the traditionally understood meaning that reasonable means cost-based.

Moreover, Section 222(e) also prohibits discrimination by LECs in the provision of SLI to publishers. If LECs are permitted to set rates for SLI depending on the value of the listings, price discrimination is likely to result. For example, a LEC could determine that business listings are more "valuable" than residential listing and charge different rates, or that some IDPs are more profitable than others and vary their prices accordingly. Given that Congress did not intend to perpetuate such discriminatory results, the Commission must ensure that its rules clearly require cost-based pricing.

That cost should be the starting point in establishing "reasonable" rates is also supported by FCC precedent, of which Congress was well aware when it enacted Section 222(e).[42] Since the inception of the Communications Act of 1934, the FCC consistently has interpreted a reasonable rate to be one that is based on cost.[43] For example, the FCC's rate of return method to ensure that rates are reasonable is inherently tied to cost.[44] Similarly, the FCC's "price cap" method of regulating rates for the largest LECs is based on cost. Indeed, the initial baseline to establish the price caps,[45]

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42 *See* ALLTEL Corp. v. FCC, 838 F.2d 551, 557 (D.C. Cir. 1988)("A basic principle used to ensure that rates are 'just and reasonable' is that rates are determined on the basis of cost.")(quoting 47 U.S.C. § 201(b)(1976)).

43 *See* In re AT&T Co. Long Lines Dept., *Memorandum Opinion and Order*, 61 FCC 2d. 587, at ¶ 66 (1976)("[A]certainment of the actual cost of providing services underlies the requirement that rates be just, reasonable, and nondiscriminatory . . .").

44 *See* National Rural Telecom Ass'n v. FCC, 988 F.2d 174, 177 (D.C. Cir. 1993)(noting that "[r]ate of return regulation is directly based on cost.").

subsequent formulas to calculate future price cap levels,[46] and periodic revisions of the price caps require an examination of actual cost.[47] Thus, it is clear that under FCC precedent, a reasonable rate is one that is based on cost.

Where Congress has failed to repeal or revise a statutory term in the face of long-standing administrative interpretation of such term, its actions may be taken as "persuasive evidence that that interpretation is the one intended by Congress."[48] Given the FCC's long history of using cost as the touchstone for calculating a reasonable rate, Congress' use of the term "reasonable" in Section 222(e) is presumed, absent a contrary indication, to signify that SLI prices are to be cost-based. By declining to revise the traditional definition of reasonable rates as cost-based in Section 222(e), Congress must be understood to have incorporated this definition.

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45 *See* In re Policy and Rules Concerning Rates for Dominant Carriers, *Second Report and Order*, 5 FCC Rcd. 6786, at ¶ 17 (1990). In establishing the initial baseline for Price Caps, the FCC used then-existing rates established under the rate of return methodology. *See id.*

46 In establishing the formula to calculate future price cap levels, the FCC included "exogenous costs," reasoning that by setting price limits based on "changes in input costs," the FCC would ensure that prices would remain within a "zone of reasonableness." *Id.* at ¶¶ 48-49.

47 *See* National Rural Telecom Ass'n, 988 F.2d at 177-78.

48 CBS, Inc. v. FCC, 453 U.S. 367, 385 (1981)(*quoting* Zemel v. Rusk, 381 U.S. 1, 11 (1965)); In re Beehive Tel. Co., Inc., *Memorandum Opinion and Order*, 13 FCC Rcd. 12275, at ¶ 26 (1998)("Courts and federal agencies with authority to prescribe and oversee rates . . . evaluate whether an established regulatory scheme produces rates that fall within a 'zone of reasonableness' rather than insisting upon a single method of determining whether rates are just and reasonable.").

IV. THE COMMISSION SHOULD ADOPT RULES REQUIRING BENCHMARK RATES OF FOUR CENTS PER LISTING FOR INITIAL LISTINGS AND SIX CENTS PER LISTING FOR UPDATES.

In exercising its ratemaking authority, the Commission has flexibility to set rates within a "range of reasonableness."[49] It is not "bound to use any single formula or combination of formulae in determining rates. Its rate-making function, moreover, involves the making of 'pragmatic adjustments.'"[50] While "[i]t is true that an agency may not pluck a number out of thin air when it promulgates rules . . . [w]hen a line has to be drawn . . . the Commission is authorized to make a 'rational legislative-type judgment.'"[51] When an agency's action is "reasonable, lawful, and fully considered, courts have an obligation to respect the agency's policy."[52] The Commission must draw such a line here in order to ensure that access to SLI and competition in the directory-publishing business is not hindered by unreasonably high prices for SLI and SLI updates.

Data submitted with the comments and, to a greater degree, in the permissible *ex parte* submissions made after the close of the comment period, indicate that LECs generally -- although not universally -- provide two kinds of listings products: base files and updates.[53] A base file generally

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49 FPC v. Hope Natural Gas, 320 U.S. 591, 602 (1944); Time Warner Ent. Co. v. FCC, 56 F.3d 151, 163 (D.C. Cir. 1995)("[A]gency ratemaking is far from an exact science and involves policy determinations in which the agency is acknowledged to have expertise.").

50 Hope Natural Gas, 320 U.S. at 602.

51 WPJ Tel. Co. v. FCC, 675 F.2d 386, 388-89 (D.C. Cir. 1982)(citations omitted).

52 *Id.* at 39.

53 *See, e.g.*, Ameritech *Ex Parte* Submission at 1 (17 Mar. 1999)("The Commission is aware that telephone exchange service providers typically make SLI available in two general forms, base files and updates.").

consists of all listings for a defined geographic area reflected in the LEC's database at a particular point in time.[54] Updates take a variety of forms but generally involve periodic provision of lists of new subscribers or of changes to the base file (new connects, disconnects, changes of name or location, *etc.*).[55]

The record indicates that actual per listing prices for SLI, apart from the four cent base file rate charged by BellSouth and the three and one half cent base file rate just filed by Bell Atlantic in New York, tend to run between ten cents and more than a dollar. Update rates are even higher, with BellSouth charging as much as $2.00 per listing for them. The pervasiveness of such rates confirms the need for Commission rules to bring SLI rates down to reasonable levels.

The record in this docket shows that it costs LECs significantly less than one cent per listing to provide SLI.[56] Accordingly, ADP urges the Commission to adopt rules providing that SLI prices not exceeding four cents per listing for a base file, and six cents per listing for updates, are presumptively reasonable and rates above those benchmarks are presumptively unreasonable in the absence of a showing to the contrary by the LEC. This would most efficiently be accomplished by a

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54 *See id.* ("Base files can be characterized as a snapshot of a given local exchange carrier's (LEC's) SLI for a specific geographic area, at a given point in time.").

55 *See id.* ("Updates on the other hand represent changes to the subscriber listing database of the LEC over a given period of time."); SBC Responses to Interrogatories at 12 (stating that SBC will provide publishers with SLI updates, consisting of "published new, change, record, move to, and disconnect telephone company service order activity").

56 ADP notes that US WEST has stated that its estimated costs for initial listings and updates are between $0.015 and $0.02 per listing. *See* US WEST *Ex Parte* Submission (17 Mar. 1999).

rule setting these rates as a ceiling and entertaining petitions for waiver of that rule where LECs can show that they cannot recover their costs at that rate.

The establishment of presumptive benchmark rates for SLI and SLI updates is the most efficient means of ensuring that LECs' rates are reasonable and cost-based. Because the Commission will only be called upon to resolve waiver requests in rare circumstances, *i.e.*, when a LECs' costs exceed the benchmark, this approach will preserve the Commission's scarce administrative resources. Moreover, the establishment of benchmark rates is consistent with the Commission's philosophy of using regulatory measures to control pricing by carriers with control over bottleneck facilities.[57] Such an approach is necessary to fulfill the Commission's statutory mandate to ensure that rates for SLI are reasonable and nondiscriminatory.

Such an approach was suggested by ADP and the Office of Advocacy, U.S. Small Business Administration ("SBA"), in their *ex parte* comments in this proceeding (the "Joint Proposal").[58] ADP and SBA jointly proposed that the Commission adopt pricing rules for SLI that make clear that "market-based" rates are unreasonable and that only cost-based rates satisfy Section 222(e). ADP and SBA jointly proposed that the Commission establish a presumptively reasonable per listing benchmark rate for SLI of four cents per listing. Rural telecommunications carriers, as defined in

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57 *See, e.g.*, In re International Settlement Rates, IB Docket No. 96-261, *Report and Order*, 12 FCC Rcd. 19806, at ¶ 3 (1997)(mandating the maximum settlement rates that U.S. carriers may pay to their foreign counterparts to eliminate "price squeeze" behavior), *aff'd sub. nom.*, Cable & Wireless PLC v. FCC, No. 97-1612 (D.C. Cir. 12 Jan. 1999).

58 U.S. Small Business Administration *Ex Parte* Submission (17 Sept. 1998); ADP *Ex Parte* Submission (17 Sept. 1998).

Section 3(37) of the 1996 Act, 47 C.F.R. § 153(37), would be exempt from the benchmark. As discussed below, the record establishes that benchmark rates of four cents per listing for initial listings, and six cents per listing for listing updates, would cover the LECs' costs plus a substantial profit. Thus, rates at or even substantially below these benchmarks would enable LECs to recover their costs plus a reasonable return. However, LECs that can meet the burden to demonstrate that their particular costs make the benchmark rates too low to cover their costs (plus a reasonable profit) would be permitted to seek a waiver of the benchmark. By shifting the burden of proof to the LECs to justify a rate increase, this approach will ensure that LECs can not deviate from the benchmark rates unless such deviation is clearly and concretely justified by the LECs' costs.

In the event that the Commission were to prefer (as some commenters suggested[59]) to address the reasonableness of rates above the benchmarks through the complaint process, rather than a waiver process, ADP suggests that the Commission adopt streamlined complaint procedures similar to those established for Cable Programming Service Tier rates.[60] To ensure that the LECs do not use their control over SLI to impose monopoly rates in excess of the benchmark, the complaint process should be very simple: a complaining IDP should be required to submit no more than the name and address of the IDP; the name and address of the LEC; the rate charged that is in excess of the benchmark; a description of the SLI product involved; certification that the complaint has been served on the LEC; and certification that, to the best of the complainant's knowledge, the information provided is true and

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59 *See, e.g.*, ALLTEL Reply Comments at 5.

60 *See* 47 C.F.R. § 76.950 *et seq.*

correct.[61] Once the complaint has been filed and served on the LEC, the burden will shift to the LEC to prove that the rate is reasonable through the production of cost data.[62] While the complaint is pending, the publisher may simply pay the benchmark rates. If the LEC can prove through cost data that a higher price is justified, the publisher will pay the difference; otherwise, the benchmark rates will become permanent. So long as the complaint process is relatively simple and inexpensive, LECs will be prevented from initially imposing exorbitant rates for SLI due to their monopoly control over these data.

ADP also urges the Commission to make clear that the benchmark rates will apply regardless of the format of the directory or the number of times a publisher wishes to use the listings. There is no reasonable basis for charging different prices based on upon the type of directory in which the listings will be used or the number of times the listings will be used.[63] Pricing strategies that impose such prohibitions are intended to be a barrier to IDPs creating multiple directory products (including CD-ROM, Internet, and other non-print directories) and building and maintaining a database. In short, such tactics are designed to discourage competition by making it unprofitable. This is exactly the behavior that Section 222(e) was designed to prevent.

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61 For example, FCC Form 329 provides a simple means of filing a complaint regarding cable programming service rates; however, a prescribed form is not necessary here.

62 *See* 47 C.F.R. § 76.956.

63 For example, Ameritech charges $0.13 per listing for publication in a single directory and $0.25 for publishing listings in multiple directories and for use in building and maintaining a database. See Ameritech *Ex Parte* Submission at Attachment 1.

A. Four Cents per Listing is a Reasonable Presumptive Ceiling for Base Files.

In response to a 22 July 1998 New York Public Service Commission ("NY PSC") mandate that SLI be tariffed at rates based on incremental cost,[64] Bell Atlantic, on 11 January 1999, filed a tariff setting a rate of $0.0305 per initial listing.[65] Based on other data, this purportedly cost-based rate may well overstate Bell Atlantic's incremental costs. However, this rate is temporary and Bell Atlantic has been ordered to produce cost data in the next stage of the proceeding. Permanent cost-based rates will be set that may be lower than the three cent figure currently on file. These actions at the state level confirm that a four cents per listing rate is the highest reasonable rate for base file listings supportable on the record in this proceeding.[66]

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64 On 2 October 1998, Bell Atlantic filed tariff revisions modifying its Tariff P.S.C. No. 900 for provision of listings to directory publishers. Bell Atlantic proposed charging directory publishers $0.20 per listing. The NY PSC rejected Bell Atlantic's tariff modifications, noting that none of the modifications complied with its 22 July 1998 Order, requiring cost-based prices.

65 Bell Atlantic's 11 January 1999 tariff revisions are appended hereto as Exhibit F.

66 Bell Atlantic also provided in its tariff that the New York Settlement Access Pool would act as a "clearinghouse" for competitive LEC ("CLEC") listings, to be provided along with Bell Atlantic's own listings to IDPs. Pursuant to Bell Atlantic's tariff, IDPs may obtain CLEC listings for an additional $0.0173, which covers the cost of the administrative functions of the clearing house. These data show that, according to Bell Atlantic, a reasonable, cost-based rate for SLI is under four cents per listing. Only a few cents more per listing covers the cost of integrating CLEC listings with ILEC listings and compensating the CLECs for these listings. These data alone would justify a decision by the Commission to establish a four cent benchmark for SLI and a slightly higher benchmark for SLI updates to account for the additional processing required to produce them.

The four cent rate is also consistent with US West's estimated cost of $0.015 to $0.02 for initial listings and updates.[67] The proposed benchmarks permit recovery of US West's costs plus a generous profit.

The four cent rate, at least for base file listings, also has been found reasonable by several state Public Service Commissions ("PSCs") with respect to tariffs filed by BellSouth in those states.[68] Although this four cent price substantially exceeds the costs on which it was based, it is capable of serving as a reasonable benchmark for listings and listing updates because it compensates BellSouth for its costs as well as a substantial profit in the order of magnitude of 1,300%.[69] In a proceeding before the Florida PSC in 1993, BellSouth presented cost data showing that the cost to produce an initial listing is $0.003.[70] According to BellSouth, these data included labor costs for system development and maintenance, computer processing costs, and material, packaging, and delivery

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67 US West *Ex Parte* Submission (17 Mar. 1999).

68 BellSouth *Ex Parte* Submission at Exhibit 1 (19 Nov. 1998); *But see* Pacific Bell, Schedule Cal. P.U.C. No. A5, 3rd Revised Sheet 517.2 ($100.00 per 1,000 listings for base file and listing updates or delivery information), appended hereto as Exhibit G. The reasonableness of the Pacific Bell rate is currently under review before the California PUC in Docket No. R-95-04-044.

69 Testimony of Lynn Juneau, Manager, Interconnection Services Pricing Group, BellSouth, before the Florida PSC in Docket No. 931138-TL, at 130 (13 Jan. 1997)(stating that, in addition to cost, BellSouth's four cent rate recovers a "contribution, if you calculate it mathematically, of 1,300%"), appended hereto as Exhibit H.

70 Southern Bell Response to DADS and DPDS Data Request of the Florida Public Service Commission (8 Feb. 1993).

costs.[71] Even if this cost study did not account for all costs associated with producing the listings, a four cent benchmark price would still permit full cost recovery due to the large profit margin.

Moreover, the four cent price charged by BellSouth does not just represent its costs; it represents a value-based price. In the Florida PSC proceeding, BellSouth successfully argued that the its tariff price should permit it to recover the "value" of its listings, in addition to its costs plus a reasonable profit.[72] ADP respectfully disagrees with the decision of the Florida PSC. However, ADP believes that a four cent price permits IDPs to compete effectively with the LEC-affiliated publishers, despite the fact that this price incorporates monopoly profits for the LECs. Thus, this price represents an appropriate pragmatic judgment under the circumstances.

The reasonableness of four cents as a presumptive benchmark is also confirmed by reference to publicly available data regarding prices for mailing lists. Mailing lists are offered in apparently competitive markets. While differing from SLI in crucial respects that make them non-substitutable for SLI,[73] mailing lists are typically derived from SLI published in LEC directories and thus have characteristics in common with SLI. Typically, the per listing price for these lists ranges from one to

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71 *Id.*

72 *See* BellSouth *Ex Parte* Submission at 5 (19 Nov. 1998).

73 Direct mail lists can not be used to publish directories because they are compiled from already out-of-date published white and yellow pages. *See* Bob Stone, Successful Direct Marketing Methods 190 (6th ed. 1997). Thus, these lists are not substitutable for the LECs' databases, which are updated daily.

ten cents, depending on the number of enhancements to the list.[74] Hence, average prices for mailing lists provide a reliable proxy for SLI in determining a "competitive" price and indicate that four cents per listing probably exceeds the price that would exist for SLI were there suppliers of these data other than the LECs.

Ameritech claims that "if the Commission does establish a rate for base files, that rate should be only for raw SLI that has not been enhanced (i.e., provided by individual NPA-NXX combination and not sorted by class of service or in other way)."[75] ADP respectfully disagrees with Ameritech's proposal. Pricing data for mailing list products demonstrate that sorting these data, which are similar to SLI in some respects, costs only a fraction of a cent more than the initial listing price.[76] Because the four cent benchmark significantly overstates the LECs' costs to provide SLI, the rate will ensure that LECs are compensated for sorting listings, plus a reasonable profit. However, to the extent that a LEC believes that its costs exceed the benchmark, it can seek a waiver. Moreover, if a LEC can not accommodate an IDP's request for sorted SLI, the LEC may provide SLI that contains additional listings. However, the IDP should only be charged for those listings it actually publishes.

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74 32 SRDS Direct Marketing List Source 1, at 1923 (Feb. 1999)("SRDS"); *see also* Edward L. Nash, Database Marketing: The Ultimate Marketing Tool 173 (1993).

75 Ameritech *Ex Parte* Submission at 2-3 (17 Mar. 1999).

76 For example, Ameritech sorts its direct mail list products by zip code, county, gender, household income, presence of children, home ownership, and numerous other categories for between $5.00 and $10.00 per thousand listings. *See* SRDS at 2300.

B. A Presumptive Ceiling on Update Prices No Higher Than Six Cents Is Reasonable.

The record suggests that the per-listing costs associated with updates might be somewhat higher than those associated with base files. For example, YPPA indicates that an ILEC's costs to prepare an extract of SLI data may be the same whether a base file or an update file is being prepared but, because there will be fewer listings in the update file over which to spread the cost, the per-listing cost of the update file will necessarily be higher.[77] The cost data furnished by BellSouth to the Florida Commission and submitted in this proceeding by ADP also indicate a higher per-listing incremental cost for updates ($0.003 for base file vs. $0.004 for updates).[78] US West estimates that updates cost approximately one half cent more per listing than base file listings.[79] The New York Commission has determined to set rates for updates separately from those for base file listings.[80]

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77 *See* YPPA *Ex Parte* Submission at 4 (27 Feb. 1998).

78 This conclusion is also bolstered by the results of a proceeding before the Texas Public Utility Commission ("Texas PUC"). The Texas PUC approved rates for directory assistance (DA) listings based on cost studies submitted by Southwestern Bell: a TELRIC-based rate of $0.0011 for the initial load and rates of $0.0014 per listing if the data are provided electronically and $0.0019 if they are provided via magnetic tape. In re Petition of MCI for Arbitration of Directory Assistance Listings Issues, Docket No. 19075, *Order Approving Amendments to Interconnection Agreement* (2 Dec. 1998), appended hereto as Exhibit I. The databases that house DA listings are sufficiently similar to SLI databases that differences in cost between initial load and updates would be similar for SLI, *i.e.*, the cost to provide updates would be only 30-60 percent higher than the cost to provide initial listings. Moreover, these data demonstrate, as ADP has claimed from the start, that the actual cost to the LECs to maintain their databases is extremely low.

79 US West *Ex Parte* Submission (17 Mar. 1999).

80 *See* Local Competition II, Case Nos. 94-C-0099, 95-C-0657, 91-C-1174, 96-C-0039, *Order Regarding Directory Database Issues* (NY PSC 22 July 1998), appended hereto as Exhibit J.

Thus, consistent with the standards set forth above, a cost-based per-listing rate for updates that is higher than the per-listing rate for base file listings but does not operate to deter or impede competition would seem reasonable. The available data suggest that the relevant difference in costs, in per-listing terms, is no more than 33 percent of the base file cost. While ADP believes that a four cent per listing rate probably covers any additional cost associated with updates, it is certain that a presumptively reasonable rate ceiling for updates of six cents per listing -- reflecting a 50 percent increase over the base file rate that ADP believes to be the highest reasonable rate -- would meet any conceivable concern about higher costs for updates while not exceeding the limits necessary to protect and promote directory competition.

V. CONCLUSION.

For the foregoing reasons, the Commission should adopt a four cent per listing presumptive ceiling price for initial listings and a six cent per listing presumptive ceiling price for updates.

Respectfully submitted,

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COMPETITIVE ISSUES RELATING TO SUBSCRIBER LISTING INFORMATION

A Brief Empirical Economic Overview

by

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SPECTRUM ECONOMICS, INC.

June 1996

INTRODUCTION AND SUMMARY

Spectrum Economics was asked by the Association of Directory Publishers (ADP) to assist ADP in responding to the Commission's Notice of Proposed Rulemaking regarding implementation of the new provision of the Communications Act that requires telephone companies to provide subscriber listing information to directory publishers other than the telephone company's affiliated publisher on reasonable and nondiscriminatory terms and conditions. Dr. Christopher Pflaum, an economist with Spectrum Economics, undertook to provide that assistance on the basis of his extensive regulatory, litigation and consulting experience in the utility, telephone and directory advertising industries. Dr. Pflaum's credentials and experience are detailed in an attachment to this report.

In this report we briefly summarize, from an economist's perspective, some of the issues arising from (l) the fundamental essentiality of subscriber listing information to the production of classified telephone directories (printed and electronic); (2) the telephone companies' absolute control over access to such information; and (3) the anticompetitive consequences that occur when the telephone companies artificially restrain their competitor's access to such information. As we see it, Congress saw those anticompetitive consequences and wanted to eliminate them, prospectively, through the enactment of Section 222(e) of the Communications Act.

Telephone Company Listing Information Is An Essential Facility

Only local telephone companies (called Local Exchange Carriers or LECs) can acquire (and have an inescapable need to maintain) a timely and accurate database of the names, addresses, and telephone numbers of every household and business that subscribes to telephone service (DLI). Since commercial telephone service began, telephone companies have provided without separate charge a listing in the telephone company's printed alphabetical (white pages) and dialup (directory assistance) directories. Business telephone subscribers, who have historically paid a higher rate for telephone service, have also received one free listing in the telephone company's "official" classified (yellow pages) business directory.

In order to establish service, bill for service, provide the "free" white pages listing, and -- in the case of businesses -- provide the "free" yellow pages classified listing, telephone company business office personnel collect and maintain the name, address, telephone number, and business classification, for each subscriber. The telephone companies' collection of names, addresses and telephone numbers is necessary to provide telephone service.

Telephone companies historically have published their own telephone directories. To do this, they routinely furnished their directory operations with the necessary subscriber listing information. The directory operations would then sell display and in-column advertising to the businesses listed in the directory and to "national" advertisers (e.g., national chains of rental car companies, nationwide franchisors, etc.).

Telephone Companies Have "Leveraged" Control Over DLI

To Monopolize Directory Publishing

The sale of yellow pages directory advertising is and has long been an enormously profitable business for telephone companies. Investment returns in excess of 100% and profit margins on sales of over 50% are common for utility publishers. These returns far exceed those typical of competitive businesses and are indicative of a monopoly market.

Prior to the divestiture of local telephone operations by AT&T in 1984, there were numerous small enterprises that published telephone directories. AT&T and most other telephone companies apparently did not see those small publishers as significant competitive threats and generally allowed them to copy listings from telephone company directories or provided updated listings at minimal "license" fees. The telephone companies also asserted copyright interest in the listings.

After the AT&T divestiture, telephone companies focused new attention on the directory business. The divested RBOCs and their traditional vendors (such as Reuben H. Donnelley, Leland Mast, and L.M. Berry) began producing competitive directories outside their traditional service areas in competition with local telephone utilities. This competition resulted in both price and usage pressure on the incumbent monopolies as new entrants offered advertising at significantly lower rates and made enhancements to their directories which made them more useful to consumers.

The telephone companies responded to actual and potential competitive entry into their directory monopolies by raising artificial barriers to such entry. One of the most common barriers was to make subscriber listing information more expensive and more difficult to use than it had formerly been. Some telephone companies refused absolutely to provide subscriber listing information to competitors, while others accomplished substantially the same result by imposing prices and terms and conditions that made the data unacceptably costly and difficult to obtain and use in a competitively meaningful way.

Such restrictions on the availability of subscriber listing information were often accompanied by other anticompetitive acts by telephone utilities. For example:

- targeted price cuts for directory advertising
- threats of copyright litigation against small publishers who couldn't afford higher DLI rates
- disparagement of competitive directories as "inaccurate" because the independent publisher lacked access to timely listing information.

A common predatory strategy combined these elements. The first step was to increase the price of listings to make them unaffordable to competitors. This caused the competitor to switch from using an up-to-date database to the less expensive option of copying the utility's listings from the current utility directory (called the book-on-the-street). Utility sales representatives would then disparage the competitive directory as containing inaccurate listing information.

As electronic directory services started to become feasible (initially through such technologies as audiotext and, more recently, through on-line computer and video services) some telephone companies sought to prevent entry into those segments of the market by refusing to provide subscriber listings at any price or on any terms for use in electronic directories. This problem was especially acute in the case of former Bell System companies that wanted to deter competitive entry into electronic directory services until they could escape the "information services" provisions of the AT&T divestiture decree (sometimes called the MFJ).

Antitrust suits were brought by publishers complaining of these tactics. I served as a consultant, or testifying expert in several such matters, including: Great Western Directories v. Southwestern Bell Telephone; Metropolitan Directories v. Southwestern Bell, Inc.; Great Western Directories v. GTE; and Telecom*USA, Inc. v. U S WEST, Inc. Some of these suits resulted in improved competitive conditions but such litigation is inherently costly and time-consuming. Furthermore, in my opinion, the results of litigation have resulted in less than efficient outcomes..

Competition In Directory Publishing

Is Economically Desirable

Economic theory generally embraces competition on the grounds that under most circumstances in most industries, it produces a better combination of output, price and quality for consumers than any other market structure. Given the right basic conditions, competition in the yellow pages classified telephone directory business should provide lower prices and greater choices for advertisers, and more and better quality telephone directory information for directory users (i.e., the general public).

In my experience in directory publishing, the advent of competition has caused utility publishers to improve their products. Prior to more widespread competition in the industry following the AT&T divestiture, most utility directory publishers produced books that incorporated minimal features and were shoddily constructed. Innovations such as larger type, color and white knock-out advertisements, zip codes in white pages address listings, area maps, community interest sections and talking yellow pages were all first introduced by competitive publishers.

Competition has also restrained the pricing of many utility directory publishers. For example, a study by Spectrum Economics of advertising pricing by a utility publisher showed that the inflation-adjusted price of advertising fell in competitive markets but increased substantially in monopoly markets. We have also noticed that in one case where a utility has been successful in suppressing competition by

restricting access to DLI, it subsequently aggressively raised prices and reduced the quality of the directories it publishes in its less competitive markets.

Regulation of DLI Pricing And Terms Is Necessary To Ensure The Benefits of Competition

In the real world, markets are rarely perfect and frequently they are not even workably competitive. Firms acquire market power and may use that power to illegitimate ends. Antitrust action is one response by society to this abuse. Where market power is acquired as the result of government action, the abuse of that power is proscribed and controlled through regulation.

Regulation is an imperfect substitute for true competition, even if that competition is imperfect. However, the transition from a ubiquitous monopoly to workable competition does not occur overnight. Government intervention may be needed to create or protect the conditions necessary for competition to develop and survive.

In the current transition of telecommunications, FCC regulation is a good example of such intervention. In order for competition in the telephone directory business to develop and endure, there is a need for the government to establish the ground rules for directory publishers' access to subscriber listing information and to make sure that telephone utilities follow those rules in good faith. There is simply no

possibility that a competitive market in DLI will evolve in the foreseeable future and there is no substitute for these data. DLI is a quintessential "essential facility" and allowing telephone utilities to have unfettered control of it will allow them to secure unfair competitive advantage in numerous media markets including both print and electronic directory advertising, direct mail advertising, and emerging media which depend on telephonic access to consumers.

The legal provision at issue in this rulemaking -- Section 222(e) of the Communications Act -- seems designed to produce a set of conditions conducive to enhanced consumer welfare through competition. It would do so by removing a formidable barrier to such competition: unreasonable restrictions on access to telephone subscriber listing information. However, the experience of several years of antitrust litigation between independent directory publishers and telephone companies teaches that a general requirement that listings be available on reasonable and nondiscriminatory terms is a necessary but not a sufficient condition to ensure that such access is widely available in practice.

FCC Rules Regarding Terms And Prices For Publisher Access To DLI Are Necessary

FCC rules are needed to make clear what is reasonable and nondiscriminatory. Such rules ought both to prohibit expressly the abuses already known and litigated over and to prevent new forms of the old problems from emerging. Thus, at a minimum, the FCC should establish rules that:

- require telephone companies to make subscriber listing information available to publishers of directories, in both print and electronic form,

- prescribe incremental cost (or some reasonable surrogate for incremental cost) plus a reasonable return as the basis for pricing access to subscriber listing information, and

- require that listings be made available on terms and conditions that do not inhibit or restrain competitive entry into the telephone directory business.

The starting point, of course, is recognizing that timely access to accurate and up-to-date telephone subscriber listing data is essential to directory publishers and that the telephone companies are the only source. FCC rules expressly requiring that listings be made available and an efficient Commission mechanism to resolve disputes about availability would be a reasonable and pro-competitive regulatory measure.

In the past, telephone companies have imposed a dizzying array of conditions on access to listings. These restrictions were apparently designed to diminish the ability of competing directory publishers to produce and distribute directories in effective competition with the telephone companies. FCC rules should expressly prohibit any condition or limitation that is not necessary to protect reasonable customer privacy interests (such as unlisted and unpublished service listings) and should require that the telephone

companies make available data at no higher a level of aggregation than the exchange (NXX), in standard commercial formats (DBase, ASCII, etc.) and media (paper, 9 track ASCII or EBCDIC, etc.).

It would be anticompetitive to require small local or regional competitors to be required to take the same universe of data as that provided to the affiliated publisher or to take data in a difficult to use format which requires extensive and difficult data processing. Rather, within the capabilities of the telephone companies' systems (including economically reasonable upgrades thereof), independent publishers should be able to choose components from a menu of alternatives with respect to geographic coverage, method of delivery, and class of service (residential or business).

From an economic perspective, I want to focus particularly on the question of prices for listings. Subscriber listings present issues familiar to students of public utility pricing. Virtually all of the costs associated with the acquisition, compilation, and maintenance of listings are costs that would have to be incurred whether or not the telephone company provides them to unaffiliated publishers and whether or not the telephone company itself produced directories; they are integral to maintaining the infrastructure of the telephone company. Furthermore, revenues from providing these data to directory publishers are inconsequential relative to the revenues from core activities.

Given these circumstances, there are two considerations in pricing these data:

- The direct costs associated with extracting them from the computer, putting them on a tape or disk or printout and delivering them to the publisher which must be fully recovered from the buyers of these data.

- A policy decision regarding what, if any, portion of the common costs of maintaining the database should be recovered in the price charged to independent directory publishers and other purchasers of these data.

The direct costs associated with providing listings can easily be calculated from telephone company cost records and employee timesheets. For example, BellSouth developed such information in 1993 to develop a rate for providing listings to independent directory publishers. BellSouth's cost study, a copy of pertinent of pages of which is attached to this report, indicated that the direct cost of providing listings to independent directory publishers was $0.003 to $0.004 per listing. That cost comprised labor costs for computer program development and maintenance, computer (CPU) time to produce an extract of listings from the database, and material packaging, and shipping of the magnetic tape containing the listings. Since all of the former Bell Companies use essentially the same customer information system, this cost is a reasonable estimate for all of them. It is also reasonable to assume that this cost is at least roughly representative of the costs that would be incurred by non-Bell telephone companies.

In its March 1993 decision in Docket No. 921317-TL, the Florida Commission accepted these costs and decided to allow BellSouth to charge independent directory publishers $0.04 per listing for access to subscriber listings.[1] That price, still very low compared to the price currently charged by most telephone companies for comparable data, is still ten time the cost of providing the listings, according to BellSouth's own data. [2]

There are two fundamental policy questions inherent in the Commission's decision on this matter:

- Are telephone utilities to be allowed to leverage their market power in wireline and mobile telephone service into adjacent markets?

- Does the Commission wish to hasten the transition of the markets to a fully competitive status by using regulatory powers to reduce barriers to entry?

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[1] Telephone companies routinely charge rates between 75 cents and a dollar in addition to costly administrative and other fees. Based on my experience and knowledge of the directory industry, those prices are far in excess of costs and are little more then thinly disguised attempts to harm competitors by increasing their costs of doing business.

[2] Southwestern Bell has also admitted that the incremental cost to provide listings information to directory publishers is less than one cent. More recently, in a March 1995 study, the Canadian Radio-Television and Telecommunications Commission (CRTC) established a price of 6 cents -- 5 cents in U.S. dollars -- for provision of listings by Bell Canada. That price included a reasonable profit.

The first question is most fundamental. If for any reason the Commission allows the local telephone companies to charge more than a modest premium over cost for access to DLI, it has implicitly endorsed leveraging of the franchise into adjacent markets. Attempts to support local service subsidies by taxing independent publishers through DLI pricing may or may not be good public policy but it unquestionably countenances monopolization of what is not a public utility function.

Regarding this question, it is my opinion that the Commission's general goal should be to promote economic efficiency and consumer welfare by requiring that subscriber listings be priced at a level that approximates the telephone companies' incremental cost. It is not economically efficient to restrict competition in this industry based upon either theory or past experience. Therefore, at a minimum, the increment over cost in providing DLI should be small.

Regarding the second consideration, I believe that the Commission should carefully consider the laudatory effects of competition in the development of print telephone books. Telephone directories today are a uniformly better product than they were fifteen years ago when publication was monopolized by telephone utilities. Today, independent publishers are on the cutting edge of bringing directories into the electronic age as they were in bringing the paper product into a new era.

The lower the barriers to securing the data necessary to develop new products, the greater will be the number of entrepreneurs attracted to the markets and the more new products that will be delivered. This is an incontrovertible economic fact. The pricing of subscriber list information on an incremental cost

basis will encourage both expansion of existing firms and entry by new ones (especially in view of the current monopoly-based prices).[3]

I look forward to the opportunity to review and respond to the other parties' comments in this proceeding.

[3] There is remarkably widespread acceptance of the notion that subscriber listing information ought to be priced at the incremental cost of providing it: For example, the Economic and Monetary Affairs Committee of the European Parliament in an April 1996 report declared that "new operators and entrants into the directories market should be given access to the names, addresses and telephone numbers of all telephone customers at marginal cost." The Report further states that "[e]xisting operators should not be able to abuse their dominant position by charging unreasonable prices." That same view was expressed by two conferees to the 1996 Telecommunications Act who stated that the key component to the pricing of subscriber list information was to be incremental cost as it would most benefit the public and prevent telephone companies from otherwise "load[ing] the price."